# Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08(RS)-3–08 OF 2018(W), 08(RS)-6–08 OF 2018(W), 08(RS)-7–08 OF 2018(W), 08(RS)-12–10 OF 2018(B), 08(RS)-13–11 OF 2018(W), 08(RS)-14–11 OF 2018(A) AND 08(RS)-17–12 OF 2018(W)

TENGKU MAIMUN CHIEF JUSTICE, ZABARIAH YUSOF, HASNAH HASHIM, HARMINDAR SINGH AND RHODZARIAH BUJANG FCJJ

30 NOVEMBER 2020

*Constitutional Law — Judiciary — De facto doctrine — Whether public policy recognised all judicial and administrative decisions of a judge as valid even though the judge's appointment de jure was liable to be set aside — Whether 'de facto doctrine' existed to preserve the integrity of judicial and administrative decisions to avoid chaos and confusion that might otherwise result if appointment of judge was found to be invalid — Whether 'de facto doctrine' operated so long as impugned judge held office under some colour of lawful authority and did not use the doctrine for his own protection — Whether decision and appointment of de facto judge could not be attacked or questioned collaterally in other proceedings but only directly in proceedings specific for that purpose and to which the judge was a party*

*Constitutional Law — Courts — Federal Court — Power to review and set aside previous decision to prevent injustice or abuse of process — Rule 137 of Rules of the Federal Court 1995 — Whether applicants had successfully established grounds for Federal Court to exercise inherent jurisdiction under r 137 in their favour*

The instant judgment was in respect of seven notices of motion filed by the applicants herein under r 137 of the Rules of the Federal Court 1995 ('the RFC') requesting the Federal Court ('FC') to review and set aside the decisions made by other panels of the court in the appeals between the respective parties in the seven cases. Hereafter, the motions filed by Yong Tshu Khin and Annie Quah Lay Nan will collectively be referred to as 'the Yong Tshu Khin Motions', those filed by Yakin Tenggara Sdn Bhd and Datuk Lim Sue Beng as 'the Yakin Tenggara Motions', the one filed by Tan Boon Lee as 'the Tan Boon Lee Motion' and the motion filed by Tan Wei Hong and four others as 'the Tan Wei Hong Motion'. Although each of the aforesaid sets of motions set out separate grounds for the setting aside of the FC's decisions, they all raised a common ground. The common ground was that at the material time of the FC decisions, the appointments of the then Chief Justice of the Federal Court ('Tun Raus')

and the President of the Court of Appeal ('TS Zulkefli') were constitutionally invalid and, consequently, they had no right to sit in the FC panels that heard the said appeals and Tun Raus had no right to empanel the judges for the hearing of those appeals. In rebuttal, the respondents said that the validity of the two judges' appointments could not be challenged collaterally in the review motions and even if their appointments were invalid, their decisions (both judicial and administrative) were protected by the 'de facto doctrine'. The rationale of the doctrine, based on public policy, was that so long as a de facto judge acted under some colour of lawful authority, his decision would be valid even if his appointment was later found to be invalid. The other grounds raised by the applicants in their respective motions were as follows:

*The Yakin Tenggara motions*:

TS Zulkefli headed the five-member panel which heard the appeals. By the time the appeal came up for decision, he had resigned (or retired). Three of the remaining four judges on the panel took a majority view while the fourth judge ('Balia FCJ') announced that he concurred with and adopted a dissenting judgment that was prepared by TS Zulkefli 'prior to his retirement'. The applicants argued that despite the three-member majority, the entire decision of the FC was bad and had to be set aside as Balia FCJ could not have legally adopted the judgment of TS Zulkefli who had ceased to hold judicial office, and thereby ceased to be on the coram of the court, on the day judgment was pronounced. The respondents, however, contended that the judgment was valid under s 78(2) of the Courts of Judicature Act 1964 ('the CJA') since there was a clear majority opinion held by three of the four remaining judges on the panel and therefore Balia FCJ's 'adoption' of TS Zulkefli's judgment was irrelevant and had no effect on the overall verdict of the court.

*The Yong Tshu Khin motions*:

Tun Raus headed the five-member panel which heard the appeals. On the day fixed for decision, one of the members of the panel, Azahar Mohamed FCJ, sat alone to deliver the same in open court. The judgment was signed by Tun Raus. The applicants argued that: (a) the court that sat to deliver the verdict was not properly constituted and violated s 78(1) of the CJA which provided that where a judge was 'absent', the proceedings could still continue provided the number of judges in the coram did not fall below two; (b) the FC had no jurisdiction under s 96(a) of the CJA to make the decision; (c) there was a breach of natural justice as the applicants were not heard on certain matters; and (d) the decision of the court was erroneous.

*The Tan Boon Lee motion*:

Tun Raus and TS Zulkefli sat in the five-member panel which heard the appeal. The applicant complained that a breach of natural justice was occasioned to him on account of the FC's failure to provide written grounds of judgment for declaring him to be a vexatious litigant although both the courts below had held that he was not a vexatious litigant.

*The Tan Wei Hong motion*:

Tun Raus and TS Zulkefli sat in the five-member panel which heard the appeal

and delivered a unanimous verdict without answering the leave question posed. The applicants argued that the failure to answer the leave question gravely prejudiced them and that it amounted to a coram failure.

**Held**, unanimously dismissing all the seven motions for review:

(1) The common point in all the review motions alleging coram failure on account of the alleged invalid appointments of Tun Raus and TS Zulkefli had no merit. The appointments of the said two judges and their decisions were saved by the 'de facto doctrine' (see para 110).

(2) The 'de facto doctrine' existed to preserve the integrity of judicial decisions for at least one of two reasons — first, it insulated the de facto judge's decision from collateral attack. Otherwise, unsuccessful litigants could reserve the point as ammunition to attack the judge's lack of authority as a ground to re-litigate their case or to have the outcome changed. Doing so would put the prestige and integrity of justice and the justice system into jeopardy and disrepute. Secondly, even if a judge's appointment was set aside de jure, all judicial and administrative decisions made by the judge were saved by the doctrine — not so much to save the integrity of the judge per se, but to save the integrity of the judgment of the court. The doctrine applied equally to constitutional appointments as it did to all levels of judges including superior court judges (see paras 20, 27 & 34).

(3) The applicants were not entitled to collaterally challenge the validity of the appointments of Tun Raus and TS Zulkefli through the review motions. The validity of their appointments was not raised before them during the hearing of the appeals proper; nor was the argument raised by the applicants in separate proceedings. The 'de facto doctrine' itself made it quite plain that the validity of a judge's appointment could not be raised in collateral proceedings. In any case, even if the applicants were successful in that challenge, the decisions of the two judges remained valid by virtue of that doctrine (see paras 23 & 45).

*The Yakin Tenggara motions*:

(4) There were to two possible interpretations to s 78(2) of the CJA — one, that even though there was numerically a majority decision, the whole decision was invalid because Balia FCJ could not have adopted the 'judgment' of a person who was no longer a 'remaining judge' of the court or someone who did not 'compose the court'. The second interpretation was that the opinion of the dissenting judge was severable and did not matter (dissenting judgments, in any case, had no force of law) and so long as there was a decision of the majority of the judges composing the court, there was a valid and enforceable decision. The latter interpretation was to be preferred because it accorded with the purposive rule of construction prescribed by s 17A of the Interpretation Acts of

1948 and 1967 which was to give a construction that promoted the purpose or object underlying the CJA rather than a construction which did not promote the purpose or object of the Act (see paras 51–57 & 60).

(5) The decision of the FC in *Bellajade Sdn Bhd v CME Group Bhd and another appeal* [2019] 5 MLJ 141 applied only to the extent of invalidating the minority judgment. Upon a purposive construction of s 78(2) of the CJA, the majority judgment of the remaining judges of the court stood valid and independent of the minority. There was, accordingly, no merit in the Yakin Tenggara motions (see paras 62–63). *The Yong Tshu Khin motions*:

(6) There was no merit in the contention that there was coram failure when Azahar Mohamed FCJ sat alone to read out Tun Raus' judgment. It was justified under r 63 of the RFC. The four other judges in the panel still legally existed when the decision was delivered. As such, there was no legal incapacity that affected the coram to bring into effect s 78(1) of the CJA (see para 75).

(7) Rule 63 of the RFC was a procedural provision referring to the manner in which a judgment was to be pronounced. A judgment must be pronounced in open court even if a judge was absent so long as the coram was either substantively constituted as a full coram under s 74 of the CJA or was deemed to be a validly constituted coram under s 78 of the CJA. 'Absence' in r 63(2) meant mere physical absence. It did not have the same meaning as 'absence' in s 78(1) of the CJA where the absence was due to some legal incapacity such as retirement, illness or resignation which were legal grounds which either permanently or temporarily removed the given judge from existence in the panel. So long as the substantive coram of the court was validly and legally constituted, or was deemed to be validly and legally constituted at the time judgment was delivered, r 63 of the RFC allowed the judgment to be pronounced in the physical absence of a judge by another judge of the court or by the registrar (see paras 70–71 & 73).

(8) A motion for review was not meant to operate as another tier of appeal or to give the losing litigant a second bite at the proverbial cherry but was confined to the very specific purpose of preventing a manifest miscarriage of justice. The correctness of a decision of the FC was not, per se, a valid reason to seek a review of it. The public policy reason for setting this high threshold was premised on the simple fact that there had to be finality to litigation and due respect to the decision of the final court of appeal (see para 78).

(9) Although a breach of natural justice was a valid ground for review under r 137 of the RFC, a subsequent panel of the FC need not have to examine the court's prior decision microscopically to confirm that parties were

accorded every opportunity to be heard on every point. Parties were allowed to canvass before the court each point striking to the substance of the case. There might be instances where the court while addressing the main issues in its decision found the need to also address some other issues. The powers of the FC as the apex court could not be viewed so narrowly as to exist in a vacuum or be altogether pigeonholed into specific boxes only to be examined later under a magnifying glass to see whether the decision had strayed from the confines of the perimeters so artificially established (see paras 79 & 81).

(10) There was no reason to review the court's judgment. Five very lengthy leave questions were framed and the court had considered and dealt with them accordingly. The Yong Tshu Khin motions failed to cross the threshold of review under r 137 of the RFC and had to be dismissed (see para 84).

*The Tan Boon Lee motion*:

(11) Although it was less than ideal that the applicant was not provided with written reasons for the FC's reversal of the High Court's and the Court of Appeal's concurrent decisions, the question was whether there was a breach of a right so fundamental and prejudicial that it had occasioned a miscarriage of justice such that the decision of the court had to be set aside altogether. The applicant failed to satisfy the court that there had been a substantial miscarriage of justice within the meaning of r 137. It was well within the power of the FC to declare litigants as vexatious. The applicant was represented by counsel and he had the right to ventilate his arguments and this was done. Even if the court had provided reasons, it would not have changed the fact that the applicant would remain a vexatious litigant without any further right of appeal. The fact that the issue was of public importance did not automatically suggest that the failure to explain the decision amounted to a serious injustice to the applicant. Interests of justice also meant justice for the respondent to know that there was finality to litigation. As no serious miscarriage of justice was occasioned to the applicant such that the threshold of r 137 of the RFC had been met, the motion was without merit and had to be dismissed (see paras 94–99).

*The Tan Wei Hong motion*:

(12) It was a trite practice of the FC that even where leave to appeal had been granted, a subsequent panel need not answer the leave question or questions posed if the circumstances did not require it. It was the court's prerogative to decide, on the facts, whether the leave question warranted an answer. This court failed to see in what way the omission to answer the leave question prejudiced the applicants or amounted to coram failure. The motion was bereft of merit and had to be dismissed (see paras 103–104 & 108–109).

**[Bahasa Malaysia summary**

Penghakiman ini adalah berkaitan tujuh notis usul yang telah difailkan oleh pemohon-pemohon di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP') yang memohon Mahkamah Persekutuan ('MP') untuk menyemak semula dan mengetepikan keputusan-keputusan yang dibuat oleh panel mahkamah lain dalam rayuan-rayuan antara pihak-pihak masing-masingnya dalam tujuh kes tersebut. Selepas ini, usul-usul tersebut yang telah difailkan oleh Yong Tshu Khin dan Annie Quah Lay Nan akan dirujuk sebagai 'Usul Yong Tshu Khin', yang difailkan oleh Yakin Tenggara Sdn Bhd dan Datuk Lim Sue Beng sebagai 'Usul Yakin Tenggara', yang difailkan oleh Tan Boon Lee sebagai 'Usul Tan Boon Lee' dan usul yang difailkan oleh Tan Wei Hong dan empat yang lain sebagai 'Usul Tan Wei Hong'. Walaupun setiap set usul tersebut menyatakan alasan berasingan untuk mengetepikan keputusan-keputusan MP itu, kesemuanya menimbulkan alasan sama. Alasan yang sama itu adalah bahawa pada masa matan keputusan-keputusan MP itu, pelantikan-pelantikan Ketua Hakim Negara Mahkamah Persekutuan ('Tun Raus') dan Presiden Mahkamah Rayuan ('TS Zulkefli') adalah tidak sah secara berperlembagaan dan, berikutan itu, mereka tiada hak untuk bersidang sebagai panel MP yang mendengar rayuan-rayuan tersebut dan Tun Raus tiada hak untuk memberi hakim-hakim tersebut untuk bersidang bagi mendengar rayuan-rayuan tersebut. Dalam pematahan, responden-responden mengatakan bahawa kesahan dua pelantikan hakim tersebut tidak dicabar secara kolateral dala usul semakan semula dan jika pun pelantikan mereka tidak sah, keputusan mereka (sama ada secara kehakiman dan pentadbiran) dilindungi oleh 'doktrin de facto'. Rasional doktrin itu, berdasarkan polisi awam, adalah selagi hakim de facto bertindak di bawah autoriti yang sah, keputusannya adalah sah meski pun pelantikannya kemudian didapati tidak sah. Alasan lain yang ditimbulkan oleh pemohon-pemohon dalam usul masing-masing adalah seperti berikut:

*Usul Yakin Tenggara*:

TS Zulkefli telah mengetuai panel lima anggota mendengar rayuan. Apabila rayuan itu diputuskan, beliau telah meletak jawatan (atau bersara). Tiga daripada empat hakim yang masih bersidang sebagai panel itu memberi pandangan majoriti manakala hakim keempat ('Balia HMP') mengisytiharkan bahawa beliau bersetuju dengan dan mengguna pakai penghakiman menentang yang disediakan oleh TS Zulkefli 'prior to his retirement'. Pemohon-pemohon berhujah bahawa meskipun terdapat majoriti tiga anggota itu, keseluruhan keputusan MP adalah tidak wajar dan hendaklah diketepikan kerana Balia HMP tidak mungkin mengguna pakai dengan sah penghakiman TS Zulkefli yang telah berhenti memegang jawatan kehakiman, dan dengna itu terhenti menjadi korum mahkamah, pada hari penghakiman itu diisytiharkan. Responden-responden, bagaimanapun, menegaskan bahawa penghakiman itu adalah sah di bawah s 78(2) Akta Mahkamah Kehakiman 1964 ('AMK') kerana ia adalah jelas pendapat majoriti yang diputuskan oleh

tiga daripada empat hakim yang ada dalam panel itu dan oleh demikian 'adoption' penghakiman TS Zulkefli oleh Balia HMP adalah tidak relevan dan tidak mempunyai kesan ke atas keseluruhan keputusan mahkamah.

*Usul Yong Tshu Khin*:

Tun Raus telah mengetuai panel lima anggota yang mendegar rayan-rayuan itu. Pada hari yang ditetapkan untuk keputusan, salah seorang anggota panel itu, Azahar Mohamed HMP, bersidang seorang untuk menyampaikan yang sama di mahkamah terbuka. Penghakiman itu telah ditandatangani oleh Tun Raus. Pemohon-pemohon berhujah bahawa: (a) mahkamah yang bersidang untuk menyampaikan keputusan itu tidak dibentuk sewajarnya dan telah melanggar s 78(1) AMK yang memperuntukkan bahawa di mana seorang hakim 'absent', prosiding masih boleh diteruskan dengan syarat jumlah hakim dalam korum tidak kurang daripada dua orang; (b) MP tidak mempunyai bidang kuasa di bawah s 96(a) AMK untuk membuat keputusan; (c) terdapat pelanggaran keadilan asasi kerana pemohon-pemohon tidak mendengar perkara-perkara tertentu; dan (d) keputusan mahkamah adalah salah.

*Usul Tan Boon Lee*:

Tun Raus dan TS Zulkefli telah bersidang sebagai panel lima anggota yang mendengar rayuan itu. Pemohon mengadu bahawa pelanggaran keadilan semula jadi berlaku ke atasnya akibat kegagalan MP untuk memberikan alasan penghakiman secara bertulis kerana mengisytiharkan dia sebagai litigan yang menyusahkan walaupun kedua-dua mahkamah bawahan berpendapat bahawa dia bukan litigan yang menyusahkan.

*Usul Tan Wei Hong*:

Tun Raus dan TS Zulkefli teah bersidang dalam panel lima anggota yang mendengar rayuan itu dan menyampaikan keputusan sebulat suara tanpa menjawab persoalan tentang kebenaran yang dikemukakan. Pemohon-pemohon berhujah bahawa kegagalan untuk menjawab persoalan tentang kebenaran itu amat memprejudiskan mereka dan bahawa ia merupakan satu kegagalan korum.

**Diputuskan**, sebulat suara menolak kesemua tujuh usul untuk semakan:

(1) Perkara yang sama dalam semua usul semakan tersebut yang mengatakan terdapat kegagalan korum berdasarkan pelantikan tidak sah Tun Raus dan TS Zulkefli tidak mempunyai merit. Pelantikan kedua-dua hakim tersebut dan keputusan mereka dilindungi oleh 'doktrin de facto' (lihat perenggan 110).

(2) 'Doktrin de facto' wujud untuk mengekalkan integriti keputusan kehakiman untuk sekurang-kurangnya dia sebab — pertama, ia melindungi keputusan hakim de facto daripada serangan kolateral. Sebaliknya, litigan yang tidak berjaya boleh merizabkan perkara itu sebagai senjata untuk menyerang hakim yang tiada autoriti sebagai alasan untuk melitigasi semula kes mereka atau agar keputusan berubah. Dengan berbuat sedemikian, walaupun pelantikan hakim itu

diketepikan de jure, kesemua keputusan kehakiman dan pentadbiran yang telah dibuat oleh hakim itu terselamat oleh doktrin tersebut — bukan untuk menyelamatkan integriti hakim itu sendiri, tetapi untuk menyelamatkan integriti penghakiman mahkamah. Doktrin ini sama terpakai ke atas pelantikan perlembagaan sepertimana ia terpakai kepada semua peringkat hakim termasuk hakim Mahkamah Tinggi (lihat perenggan 20, 27 & 34).

(3) Pemohon-pemohon tidak berhak mencabar secara kolateral kesahihan pelantikan Tun Raus dan TS Zulkefli melalui usul semakan. Kesahihan pelantikan mereka tidak ditimbulkan di hadapan mereka semasa pendengaran rayuan-rayuan tersebut; dan juga hujah yang tidak dikemukakan oleh pemohon-pemohon dalam prosiding yang berasingan. 'Doktrin de facto' itu sendiri menjelaskan bahawa kesahihan pelantikan hakim tidak dapat ditimbulkan dalam prosiding kolateral. Walau bagaimanapun, jika pun pemohon-pemohon berjaya dalam cabaran tersebut, keputusan-keputusan dua hakim yang kekal sah menurut doktrin tersebut (lihat perenggan 23 & 45).

*Usul Yakin Tenggara*:

(4) Terdapat dua kemungkinan pentafsiran terhadap s 78(2) AMK — satu, bahawa walaupun ada keputusan majoriti secara berangka, keseluruhan keputusan itu tidak sah kerana Balia HMP tidak mungkin mengguna pakai 'penghakiman' seseorang yang bukan lagi 'remianing judge' mahkamah atau seseorang yang tidak 'compose the court'. Tafsiran kedua adalah bahawa pendapat hakim yang menentang boleh diasingkan dan tidak penting (penghakiman yang menentang, dalam hal apa pun, tidak mempunyai kuasa undang-undang) dan selagi terdapat keputusan majoriti hakim-hakim yang bersidang di mahkamah tersebut, maka terdapat keputusan yang sah dan boleh dikuatkuasakan. Tafsiran yang terakhir ini lebih menjadi pilihan kerana ia bersesuaian dengan rukun konstruktif yang ditentukan oleh s 17A Akta Penafsiran tahun 1948 dan 1967 yang memberikan pembinaan yang menggalakkan tujuan atau objektif yang mendasari AMK daripada pembinaan yang tidak menggalakkan tujuan atau objektif Akta tersebut (lihat perenggan 51–57 & 60).

(5) Keputusan MP dalam kes *Bellajade Sdn Bhd v CME Group Bhd and another appeal* [2019] 5 MLJ 141 hanya terpakai setakat mana metidaksahkan penghakiman minoriti. Berdasarkan pembinaan bertujuan s 78(2) AMK, penghakiman majoriti hakim-hakim yang masih bersidang di mahkamah tersebut adalah sah dan berasingan daripada yang minoriti. Oleh demikian, Usul Yakin Tenggara tidak mempunyai merit (lihat perenggan 62–63).

*Usul Yong Tshu Khin*:

(6) Tiada merit dalam hujah bahawa terdapat kegagalan korum apabila

Azahar Mohamed HMP bersidang seorang untuk membacakan penghakiman Tun Raus. Ia dijustifikasikan di bawah k 63 KMP. Empat hakim yang lain dalam panel itu masih wujud secara sah apabila keputusan itu disampaikan. Oleh itu, tiada ketidakupayaan undang-undang yang menjejaskan korum untuk menguatkuasakan s 78(1) AMK (lihat perenggan 75).

(7) Kaedah 63 KMP adalah peruntukan prosedur yang merujuk kepada cara suatu penghakiman diisytiharkan. Suatu penghakiman perlu diisytiharkan di mahkamah terbuka meskipun seorang hakim tidak hadir selagi korum itu sama ada membentuk secara substantif sebagai korum yang penuh di bawah s 74 AMK atau dianggap sebagai membentuk korum yang sah di bawah s 78 AMK. 'Absence' dalam s 78(1) AMK yang merupkan alasan sah yang mana sama ada menyingkirkan secara kekal atau sementara hakim tersebut daripada berada dalam panel itu. Selagi korum substantif mahkamah adalah sah dan dibentuk secara sah, atau dianggap sah dan dibentuk secara sah pada masa penghakiman itu disampaikan, k 63 KMP membenarkan penghakiman itu diisytiharkan dengan ketiadaan fizikal seorang hakim oleh hakim mahkmah yang lain atau oleh pendaftar (lihat perenggan 70–71 & 73).

(8) Usul untuk semakan tidak bermaksud untuk beroperasi sebagai tahap lain untuk merayu atau memberikan litigan yang sedang kalah peluang kedua tetapi terbatas kepada tujuan spesifik sahaja untuk mengelakkan ketidakadilan dilaksanakan. Pembetulan keputusan MP bukan, *per se*, sebab sah untuk memohon semakan. Sebab polisi awam untuk menetapkan ambang tinggi ini berpremiskan fakta mudah bahawa terdapat kemuktamadan kepada litigasi dan berkenaan keputusan akhir Mahkamah Rayuan (lihat perenggan 78).

(9) Walaupun pelanggaran keadilan semulajadi adalah alasan sah untuk semakan di bawah k 137 KMP, satu panel MP seterusnya tidak perlu memeriksa keputusan terdahulu mahkamah secara teliti untuk mengesahkan bahawa pihak-pihak diberikan peluang untuk didengar sewajarnya. Pihak-pihak dibenarkan mengemukakan di hadapan mahkamah setiap perkara yang penting kepada kes tersebut. Kemungkinan terdapat keadaan di mana mahkamah semasa mengutarakan isu-isu penting dalam keputusannya mendapati terdapat keperluan untuk juga mengutarakan beberapa isu lain. Kuasa MP sebagai mahkamah tertinggi tidak boleh dilihat secara sempit atau sama sekali mengklasifikasikan isu-isu berkaitan hanya dengan memeriksa kemudian dengan lebih mendalam sama ada keputusan tersebut telah menyimpang daripada batasan perimeter yang telah ditetapkan (lihat perenggan 79 & 81).

(10) Tiada sebab untuk semakan penghakiman mahkamah tersebut. Lima persoalan kebenaran yang panjang lebar telah dibuat dan mahkamah

telah mengambil kira dan mengendalikannya sewajarnya. Usul Yong Tshu Khin telah gagal untuk melepasi ambang semakan di bawah k 137 KMP dan hendaklah ditolak (lihat perenggan 84).

*Usul Tan Boon Lee*:

(11) Walaupun ia tidak *ideal* bahawa pemohon tidak diberikan sebab bertulis untuk pengakasan MP berhubung keputusan-keputusan serentak Mahkamah Tinggi dan Mahkamah Rayuan, persoalannya adalah sama ada terdapat pelanggaran hak yang begitu penting dan bersifat prejudis sehingga mengakibatkan ketidakadilan berlaku yang mana kepuusan mahkamah perlu diketepikan sama sekali. Pemohon telah gagal untuk meyakinkan mahkamah bahawa terdapat ketidakadilan yang ketara telah berlaku dalam maksud k 137. Ia adalah dalam kuasa MP untuk mengisytiharkan litigant tersebut sebagai menyusahkan. Pemohon diwakili oleh peguam dan dia mempunyai hak untuk mengemukakan hujahnya dan ini telah dilakukan. Walaupun mahkamah telah memberikan sebab, ia tidak mungkin mengubah fakta bahawa pemohon masih kekal litigant yang menyusahkan tanpa apa-apa hak rayuan selanjutnya. Fakta bahawa isu tersebut adalah demi kepentingan awam tidak secara automatik mencadangkan bahawa kegagalan untuk menjelaskan keputusan tersebut merupakan satu ketidakadilan yang serius kepada pemohon. Kepentingan untuk keadilan juga bermaksud keadilan untuk responden mengetahui bahawa terdapat kemuktamadan kepada litigasi. Oleh kerana tiada pelaksanaan ketidakadilan serius yang berlaku kepada pemohon di mana ambang k 137 dipenuhi, usul tersebut tidak mempunyai merit dan hendaklah ditolak (lihat perenggan 94–99).

*Usul Tan Wei Hong*:

(12) Ia adalah amalan tetap MP bahawa meskipun terdapat kebenaran untuk merayu yang telah diberikan, panel seterusnya tidak perlu menjawab persoalan tentang kebenaran itu atau persoalan yang dikemukakan jika keadaan tidak memerlukannya. Ia adalah prerogatif mahkamah untuk memutuskan, berdasarkan fakta, sama ada persoalan tentang kebenaran itu mewajarkan satu jawapan. Mahkamah ini gagal untuk melihat apa cara peninggalan untuk menjawab persoalan tentang kebenaran itu bersifat prejudis terhadap pemohon-pemohon atau merupakan kegagalan korum. Usul tersebut tidak mempunyai merit dan hendaklah ditolak (lihat perenggan 103–104 & 108–109).]

**Cases referred to**

*Additional District Magistrate, Jabalpur v SS Shukla etc* 1976 AIR 1207, SC (refd)

*All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97, FC (refd)

*Aldridge, In re* (1893) 15 NZLR 361, CA (refd)

*Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and*

*another appeal* [2020] 1 MLJ 689, FC (refd)
*Asean Security Paper Mills Sdn Bhd v Mitsui Sumimoto Insurance (Malaysia) Bhd* [2008] MLJU 1090; [2008] MLJU 251; [2008] 6 CLJ 1, FC (refd)
*Bellajade Sdn Bhd v CME Group Bhd and another appeal* [2019] 5 MLJ 141, FC (distd)
*Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478, FC (refd)
*Chen-Young and others v Eagle Merchant Bank Jamaica Ltd and others* [2018] JMCA App 7, CA (refd)
*Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1, FC (refd)
*Clariant Masterbatches (M) Sdn Bhd v Prestige Dynamics Industries Sdn Bhd* [2019] 3 MLJ 701, FC (refd)
*Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351, FC (refd)
*English v Emery Reimbold & Strick Ltd* [2002] 3 All ER 385, CA (refd)
*Fawdry & Co (a firm) v Murfitt (Lord Chancellor intervening)* [2003] 4 All ER 60, CA (refd)
*Flannery and another v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)* [2000] 1 WLR 377, CA (refd)
*Gokaraju Rangaraju v State of Andhra Pradesh* (1981) 3 SCC 132, SC (refd)
*James (an insolvent) (Attorney General intervening), Re* [1977] 1 All ER 364, CA (refd)
*Jyoti Prakash v Chief Justice, Calcutta High Court* (1965) 2 SCR 53, SC (refd)
*Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, CA (refd)
*Lim Lek Yan @ Lim Teck Yam v Yayasan Melaka and another application* [2010] 1 MLJ 173, FC (refd)
*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673, FC (refd)
*Milward v Thatcher* (1787) 100 ER 45, KBD (refd)
*Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449, FC (refd)
*Ng Chin Tai (trading in the name and style of Lean Seh Fishery) & Anor v Ananda Kumar a/l Krishnan* [2020] 1 MLJ 16, FC (refd)
*Nori's Application, Re* [1989] LRC (Const) 10, HC (refd)
*Norton v Shelby County* (1886) 118 US 425, SC (refd)
*PS Menon v State of Kerala* AIR 1970 Ker 165, HC (refd)
*Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97, FC (refd)
*Ramachandran a/l Suppiah v Public Prosecutor and another motion* [1992] 2 SLR 707; [1992] 2 SLR(R) 571, CA (refd)
*Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd* [2010] 4 MLJ 483, FC (refd)
*Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257, FC (refd)
*State of Connecticut v Carroll* (1871) 38 Conn 449 (refd)

*Surendra Singh and others v The State of Uttar Pradesh* 1954 AIR 194, SC (refd)
*The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469, FC (refd)
*UOL Credit Sdn Bhd v Dato' Vijay Kumar Natarajan* [2018] supp MLJ 439, FC (refd)
*United States R Retirement Bd v Fritz* (1980) 449 US 166, SC (refd)

**Legislation referred to**

Courts of Judicature Act 1964 ss 42, 74, 77, 78, 78(1), (2), (3), 96(a)
Constitution of India [IND] arts 71(2), 233
Constitution of Jamaican [JM] s 106(3)
Federal Constitution arts 122(1A), 125, 125(1), (8), 161(1), Eleventh Schedule, s 33C(b)
Interpretation Acts 1948 and 1967 ss 17A, 41(a)
Rules of the Federal Court 1995 rr 63 , 63(2), 137

*Loh Siew Cheang (Verene Tan Yeen Yi, Goh Ee Voon, Ling Young Tuen, Samantha Su Xiu Ming and Hazel Ling Ai Wenn with him) (Lee Ling & Partners) in Civil Application Nos 08(RS)-3–08 of 2018(W), 08(RS)-6–08 of 2018(W) and 08(RS)-7–08 of 2018(W) for the applicants.*
*Gopal Sri Ram (S Ravenesan, Siti Nuramirah bt Azman, How Li Nee and Marcus Lee with him) (S Ravenesan) in Civil Application No 08(RS)-12–10 of 2018(B) for the applicant.*
*Wong Rhen Yen (Jamie Wong, Wong Li Yan and Shugan Raman with him) (Jamie Wong) in Civil Application No 08(RS)-13–11 of 2018(W) for the applicant.*
*Ramkarpal Singh (Harshaan Zamani and Rayveni Asogan with him) in Civil Application No 08(RS)-14–11 of 2018(A) for the applicant.*
*Sitpah Selvaratnam (Ganesan Nethi and Siah Ching Joe with her) (Karpal Singh & Co) in Civil Application No 08(RS)-17–12 of 2018(W) for the applicants.*
*Cecil Abraham (Rishwant Singh, Pramjit Singh, Harjit Singh, Shopna Rani Malakar and Kiranjeet Kaur with him) (Harjit Sandhu, Wan & Assoc) in Civil Application Nos 08(RS)-3–08 of 2018(W), 08(RS)-6–08 of 2018(W) and 08(RS)-7–08 of 2018(W) for the respondents.*
*Khoo Guan Huat (Nimalan Devaraja and Janice Ooi with him) (Skrine) in Civil Application No 08(RS)-12–10 of 2018(B) for the first respondent.*
*Gopal Sri Ram (S Ravenesan, Siti Nuramirah bt Azman, How Li Nee and Marcus Lee with him) (S Ravenesan) in Civil Application No 08(RS)-13–11 of 2018(W) for the first respondent.*
*Loganath Brian Sabapathy (Sanjeev Kumar Rasiah, Ilyas bin Ramly and Ariel Priyanka Francis with him) (Sanjeev Kumar & Co) in Civil Application Nos 08(RS)-17–12 of 2018(W) for the first respondent.*
*Yoong Sin Min (Poh Choo Hoe with her) (Shook Lin & Bok) in Civil Application Nos 08(RS)-12–10 of 2018(B) and 08(RS)-13–11 of 2018(W) for the second respondent.*
*Cecil Abraham (Bharti Seth, Ramesh Sanghvi, Rishwant Singh and Kokilah*

*Kanniappan with him) (Bharti Seth & Assoc) in Civil Application Nos 08(RS)-12–10 of 2018(B) and 08(RS)-13–11 of 2018(W) for the third respondent.*

*Wong Rhen Yen (Jamie Wong, Wong Li Yan and Shugan Raman with him) (Jamie Wong) in Civil Application No 08(RS)-12–10 of 2018(B) for the fourth respondent.*

*Gopal Sri Ram (S Ravenesan, Siti Nuramirah bt Azman, How Li Nee and Marcus Lee with him) (S Ravenesan) in Civil Application No 08(RS)-13–11 of 2018(W) for the fourth respondent.*

*Su Tiang Joo (Nasema Jalaludheen and Rachel See Aimay with him) (Cheah Teh & Su) in Civil Application No 08(RS)-14–11 of 2018(A) for the respondent.*

*Asliza bt Ali (Mohd Ashraf bin Abd Hamid with her) (Federal Counsel) in Civil Application No 08(RS)-17–12 of 2018(W) for the second, third and fourth respondents.*

**Tengku Maimun Chief Justice (delivering judgment of the court):**

INTRODUCTION

**[1]** On 19 August 2020, we heard seven review motions filed pursuant to r 137 of the Rules of the Federal Court 1995 ('the RFC 1995'). After the close of very lengthy submissions which took up more than this court's usual sitting time, we reserved judgment. We now deliver this unanimous judgment upon much consideration.

**[2]** The applicants in Motions 08(RS)-12–10 of 2018(B) and 08(RS)-13–11 of 2018(W) are Yakin Tenggara Sdn Bhd and Datuk Lim Sue Beng, respectively. Their motions are against the decision of the Federal Court delivered on 10 October 2018. We shall refer to this set of motions as the 'Yakin Tenggara Motions'.

**[3]** The applicants in Motions 08(RS)-3–08 of 2018(W), 08(RS)-6–08 of 2018(W) and 08(RS)-7–08 of 2018(W) are Yong Tshu Khin and Annie Quah Lay Nah and their three collective review motions are against the decision of the Federal Court delivered on 9 July 2018. This set of motions will be referred to as the 'Yong Tshu Khin Motions'.

**[4]** For Motion 08(RS)-14–11 of 2018(A), the applicant is one Tan Boon Lee. His complaint is against the order of the Federal Court dated 26 September 2017. We shall refer to this motion as 'Tan Boon Lee's Motion'.

**[5]** The final Motion 08(RS)-17–12 of 2018(W) is filed by five applicants, namely, Tan Wei Hong, Tan Wei Jie, Tan Hun Khong, Lai Chew Lai and Chuan Hung Chien, against the order of the Federal Court dated

28 November 2017 and the grounds of judgment for which is dated 22 May 2018. We shall refer to the motion as 'Tan Wei Hong's Motion'.

**[6]** All the seven review motions raised a common point and further specific points peculiar to their circumstances.

**[7]** The common point alleges coram failure, in sum, that the appointments of Tun Md Raus bin Sharif as Chief Justice and of Tan Sri Zulkefli bin Ahmad Makinudin as President of the Court of Appeal (collectively the 'two judges') were respectively invalid. Arguments were advanced to the effect that the advice given by the outgoing Chief Justice, Tun Arifin bin Zakaria, to the Yang di-Pertuan Agong to appoint the two judges as additional judges of the Federal Court was invalid because such advice may only be given by a sitting Chief Justice to take effect during his tenure, and that in any event, the two judges could not have occupied their respective positions as Chief Justice and President of the Court of Appeal as additional judges of the Federal Court on a proper interpretation of art 122(1A) of the Federal Constitution ('the FC'). Accordingly, it was argued that Tun Raus was not entitled to empanel the Federal Court panels which heard the appeals and in any event, that the two judges were not entitled to sit in these cases (if they sat).

**[8]** In this judgment, we shall first deal with the common point followed by our discussion *in seriatim* on the specific points later.

**[9]** For convenience, in our discussion on the common point our reference to 'applicants' refers globally and collectively to all the applicants in all the motions and likewise, our reference to respondents refers to all parties who opposed the argument.

## DECISION

### *The de facto doctrine*

**[10]** The applicants' arguments were summarised earlier. In gist, it was their submission that the appointments of the two judges were invalid having been made ultra vires the FC. The thrust of the respondents' rebuttal is that the validity of the two judges' appointments cannot be challenged collaterally and that even if their appointments are deemed invalid, their decisions (both judicial or administrative) are saved by the 'de facto doctrine'. In reply, the applicants acknowledged the existence of the doctrine but argued that it does not apply to constitutional appointments.

**[11]** The de facto doctrine is a trite principle of law. The Supreme Court of Connecticut in *State of Connecticut v Carroll* (1871) 38 Conn 449 ('Carroll')

managed to trace the doctrine back to the year 1431 on an incident that transpired in the Abbot of Fountaine's case where it was argued that a bond given by the former abbot for the furnishing of the convent despite the fact that a new abbot had been elected to replace him, was valid.

**[12]** In *In re Aldridge* (1893) 15 NZLR 361, the New Zealand's Court of Appeal discussed the validity of the judicial acts of the three Lancastrian kings preceding King Edward VI, whom he had declared to be usurpers. A statute was passed to declare valid the judicial acts of those kings and it was later agreed that the statute was merely declaratory of the common law de facto doctrine.

**[13]** The Abbot and the three Lancastrian Kings were not of course holders of 'judicial office' as we now understand the term. That said, a decision of Buller J decided as far back as 1787 in *Milward v Thatcher* (1787) 100 ER 45 ('Milward') had this to say in respect of the application of the de facto doctrine to judges, at p 48:

> The cases cited ... are cases of writs of error brought in civil actions, and the objection was taken to the competency of the Judges below: but in such cases the question whether they be properly Judges or not, can never be determined; it is sufficient if they be Judges de facto. Suppose a person were even criminally convicted in a Court of Record, and the recorder of such Court were not duly elected, the conviction would still be good in law, he being the Judge de facto.

**[14]** This court judicially recognised and applied the de facto doctrine in *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 ('Malayan Estates').

**[15]** What is the de facto doctrine and why does it exist? The respondents rested their arguments on *Malayan Estates* which held that the decisions of a judge or judicial arbiter can be deemed valid on grounds of public policy even if his appointment is invalid. The Federal Court arrived at this conclusion by placing heavy reliance on the judgment of the Indian Supreme Court in *Gokaraju Rangaraju v State of Andhra Pradesh* (1981) 3 SCC 132 ('Gokaraju') the facts of which can be summarised as follows.

**[16]** The case was a consolidated appeal by two accused persons who were convicted of certain offences each by two separate District Court judges. By the time the appeal came up before the Supreme Court, the court had held in another appeal that the appointments of the two sessions judges were invalid as having violated art 233 of the Indian Constitution. The appellants argued that as the appointments of the two judges were unconstitutional, their judgments were not lawful and that accordingly, their convictions ought to be set aside.

**[17]** The Indian Supreme Court rejected the arguments on the basis that the

A decisions of the two session judges were saved by the de facto doctrine. The rationale is that so long as the de facto judge acted under some colour of lawful authority, his decision may be saved and preserved even if his appointment is later found to be invalid. It is to be noted that the argument in *Gokaraju* was principally the same as the argument here, that is to say, that a judgment of a B judge who is not a judge is not a judgment at all. In answer to this point, Reddy J remarked, at pp 134–135:

> The question may seem to be short and simple but it cannot be answered without enquiry and research. An answer, on first impression, may be 'a judgment by a judge C who is not a judge is no judgment' a simple, sophisticated answer. But it appears second thoughts are necessary. What is to happen to titles settled, declarations made, rules issued, injunctions and decrees granted and even executed? What is to happen to sentences imposed? Are convicted offenders to be set at liberty and to be tried again'? Are acquitted accused to be arrested and tried again? Public policy is D clearly involved. And in the tangled web of human affairs, law must recognise some consequences as relevant, not on grounds of pure logic but for reasons of practical necessity. To clear the confusion and settle the chaos, judges have invented the de facto doctrine, ...

E **[18]** The Indian Supreme Court also endorsed the following observations of the Kerala High Court in *PS Menon v State of Kerala* AIR 1970 Ker 165 at p 170:

> 19. This doctrine was engrafted as a matter of policy and necessity to protect the interest of the Public and individuals involved in the official acts of persons F exercising the duty of an officer without actually being one in strict point of law. But although these officers are not officers de jure they are by virtue of the particular circumstances, officers, in fact, whose acts, public policy requires should be considered valid.

G **[19]** The decision in *Gokaraju* cited and approved a long line of authorities which also made similar observations as regards the validity and integrity of decisions of administrative or judicial bodies whose appointments were subsequently deemed to be invalid. These authorities include *Milward*, *In re Aldridge*, *Carroll*, *Fawdry & Co (a firm) v Murfitt (Lord Chancellor* H *intervening)* [2003] 4 All ER 60, *Norton v Shelby County* (1886) 118 US 425 and *Re James (an insolvent) (Attorney General intervening)* [1977] 1 All ER 364 ('Re James'). These authorities were also cited with approval by this court in *Malayan Estates*. Without regurgitating them *ad nauseam*, it would suffice to conclude them thus.

I

**[20]** The de facto doctrine exists to preserve the integrity of judicial decisions for at least one of two reasons. Firstly, it insulates the de facto judge's decision from collateral attack. Otherwise, unsuccessful private litigants will reserve the point as an ammunition to attack the judge's lack of authority as a ground to

re-litigate their case or to have the outcome changed for the reason that the judge who heard their case was no judge at all. Doing so would be to put the prestige and integrity of justice and the justice system into jeopardy and disrepute. Secondly, even if a judge's appointment is set aside *de jure*, meaning that his appointment is directly and successfully assailed in proceedings against him be it in *quo warranto* or other proceedings, all decisions made by him either judicially or administratively are saved — not so much to save the integrity of that judge per se, but to save the integrity of the judgment of the court.

**[21]** To this effect, this court recently made a similar observation in the case of *Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2020] 1 MLJ 689 in respect of court orders given without jurisdiction and how they cannot be challenged collaterally. Rohana Yusuf FCJ (as she then was) observed:

> [65] The fundamental principle which is pivotal in all these decisions, is that the sanctity of a court order must at all times be observed, and a party bound by that order of a court has no business deciding for himself that a binding order of a court need not be observed because in his view it is not valid.
>
> If court orders are allowed to be ignored with impunity, it will ruin the authority of judicial order, which is the core of all judicial systems. In line with our jurisprudence, court orders must be respected and complied with. There will be no end to litigation if parties are allowed to determine for themselves that any order of the court would be observed or otherwise.'.

**[22]** A similar conclusion was endorsed by the Indian Supreme Court in *Gokaraju* in respect of judicial appointments and why decisions of de facto judges must be upheld as a matter of policy. At pp 136–137 and 140–141, Reddy J held as follows:

> 4. ... As one of us had occasion to point out earlier 'the doctrine is founded on good sense, sound policy and practical expedience. It is aimed at the prevention of public and private mischief and the protection of public and private interest. It avoids endless confusion and needless chaos. An illegal appointment may be set aside and a proper appointment may be made, but the acts of those who hold office de facto are not so easily undone and may have lasting repercussions and confusing sequels if attempted to be undone. Hence the de facto doctrine.
>
> ...
>
> 17. A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule based on public policy. The defective

A appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants ... A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments ...

B

**[23]** Now, in these cases before us, the challenge is clearly a collateral one because the validity of the appointments of the two judges was not raised before them during the hearing of the appeals proper. Neither was the argument raised by the applicants herein in separate proceedings. The respondents argued that C this failure gives rise to estoppel and waiver. These arguments, to our mind, are not relevant because the de facto doctrine makes it quite plain that the validity of a judge's appointment cannot be raised in collateral proceedings. In other words, the plea of waiver or estoppel is not necessary, as in the first place, the validity of a judge's appointment cannot be attacked collaterally.

D

**[24]** In any event, even if we were to accept the argument that the two judges' appointments were unlawful, their decisions remain protected by the de facto doctrine. The two main conditions for the doctrine to apply, as gleaned from E the foregoing authorities, are that firstly, the judges whose appointments were assailed are not mere intruders or usurpers but were holding office under some colour of lawful authority. There is no doubt that the appointments of the two judges were made under the FC, except that the propriety of such appointments is in issue. The two judges are therefore not usurpers in the sense F of the word as there is some legal basis for their appointments. The other condition for the doctrine to apply is that the de facto judge cannot himself rely on it for his own protection. See: *In re Aldridge* at p 372. That is not the case here and as such the application of the doctrine is not excluded.

G

**[25]** The natural conclusion to this issue may thus be best summarised in the words of Lord Denning MR in *Re James* at pp 372–373:

> No matter by whom the man was appointed a judge, no matter at what date he was appointed, he is sitting as a judge of the court and the order made by him is an order H of the High Court of Rhodesia. He sits in the seat of a judge. He wears the robes of a judge. He holds the office of a judge. Maybe he was not validly appointed. But, still, he holds the office. It is the office that matters, not the incumbent ... So long as the man holds the office and exercises it duly and in accordance with law, his orders are not a nullity. If they are erroneous, they may be upset on appeal. But, if I not erroneous, they should be upheld.

**[26]** With that, the only question that remains to be addressed is whether the de facto doctrine applies to constitutional appointments. The applicants speaking primarily through learned counsel Datuk Seri Gopal Sri Ram,

submitted that the doctrine cannot apply to constitutional appointments. They sought to distinguish the authorities cited by the respondents, especially *Malayan Estates* and *Gokaraju* for the point that the appointments concerned in those cases were in respect of inferior tribunals and not superior courts.

**[27]** With respect, we do not agree. It is our view that the de facto doctrine (the rule and its exceptions) applies equally to constitutional appointments.

**[28]** We appreciate that *Gokaraju* concerned the appointments of District Court judges. However, it must be noted that their appointments were constitutional ones pursuant to art 233 of the Indian Constitution. And thus, *Gokaraju* on the facts establishes the *ratio decidendi* that the de facto doctrine is also applicable to superior court judges as their appointments are also constitutional (though with different formalities).

**[29]** In fact, the Indian Supreme Court was invited to address the question on whether the doctrine applies to constitutional appointments. Reddy J's answer is found at p 141, as follows:

> 18. We do not agree with the submission of the learned counsel that the de facto doctrine is subject to the limitation that the defect in the title of the judge to the office should not be one traceable to the violation of a constitutional provision. The contravention of a constitutional provision may invalidate an appointment but we are not concerned with that. We are concerned with the effect of the invalidation upon the acts done by the judge whose appointment has been invalidated. The de facto doctrine saves such acts. The de facto doctrine is not a stranger to the Constitution or to the Parliament and the Legislatures of the States.

**[30]** The Indian Supreme Court referred to art 71(2) of the Indian Constitution which stipulates that the acts of the President or Vice-President of India shall not be invalidated in the event that their appointments are declared void. Reddy J observed that other provisions in other Indian written laws are also replete with such provisions. The court continued to observe that the existence of such provisions does not suggest that the application of the doctrine is limited or circumscribed by them. On the contrary, the said provisions whether constitutional or statutory, merely declare their existence.

**[31]** In Malaysia, this court in *Malayan Estates* applied s 41(a) of the Interpretation Acts 1948 and 1967 ('Act 388') in a manner similar to the court in *Gokaraju* to extend the de facto doctrine to the chairman of the Industrial Court whose appointment was declared invalid in that case but nonetheless whose decisions were not set aside for that reason. There is a provision in the FC which s 41(a) of Act 388 appears to mirror, that is, s 33C(b) of the Eleventh Schedule of the FC read together with art 161(1). The said s 33C(b) provides:

A 33C. Powers of board, etc., not affected by vacancy, etc. —

Where by or under any written law any board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless the contrary intention appears, the powers and proceedings of such board, commission, committee or similar body shall not be affected by —

B ...

(b) any defects afterwards discovered in the appointment or qualification of a person purporting to be a member thereof;

C **[32]** We acknowledge that s 33C(b) is not directly applicable within the narrower context of the present review motions. However, we are of the view that it nonetheless resonates with the views expressed by the court in *Gokaraju* and that in a Malaysian context, the de facto doctrine has always existed in Malaysian common law and that constitutional and statutory provisions are D merely declaratory of the scope of its application. In that sense, we do not see why the de facto doctrine is inapplicable to constitutional appointments.

**[33]** In any event, learned counsel Datuk Seri Gopal Sri Ram, with whom E other counsel for the applicants agreed, appeared to suggest that the scope of the doctrine should be confined to subordinate officers and judicial arbiters and accordingly, the doctrine cannot apply to superior court judges. With respect, we do not agree. The danger the de facto doctrine seeks to avoid is the chaos and confusion that may be occasioned in the event the appointment of a F decision-maker is found to be invalid and the stain that it might leave on the administration of justice.

**[34]** Whatever it is, the judgments of Magistrates and sessions court judges are subject to appeal or review (as the case may be). The decisions of superior G court judges are weightier especially those of the Court of Appeal and Federal Court (the latter being the final court of appeal). In addition, administrative decisions of the Chief Justice or President of the Court of Appeal such as recommendations on the appointments and elevation of judges or their discretions to empanel the Federal Court or the Court of Appeal, respectively H carry significant ramifications. If the decisions of a superior court judge are not preserved by the de facto doctrine, the entire justice system might crumble to dust if such appointments are later deemed invalid.

**[35]** Datuk Seri Gopal Sri Ram sought to distinguish *Gokaraju* by referring I to another judgment of the Indian Supreme Court in *Jyoti Prakash v Chief Justice, Calcutta High Court* (1965) 2 SCR 53 ('Jyoti') for the point that the de facto doctrine does not apply to constitutional appointments. In particular, learned counsel relied on the following dictum of Gajendragadkar CJ at p 66:

In such a case, if the decision of the President goes against the date of birth given by

> the appellant, a serious situation may arise, because the cases which the said Judge might have determined in the meanwhile would have to be reheard, for the disability imposed by the Constitution when it provides that a Judge cannot act as a Judge after he attains the age of superannuation, will inevitably introduce a constitutional invalidity in the decisions of the said Judge, and it is plain that it would be the duty of the Chief Justice to avoid such complication.

**[36]** *Jyoti* concerned the question of who under the Indian Constitution had the final say in the determination of a judge's age. The appellant contended that at the date of his appointment, he had provided the government with documents attesting to his age and that once accepted, his age could no longer be disputed. The dispute came about when the Indian Home Minister upon examining public records and upon consulting the Chief Justice of India ascertained that the appellant's birth date was 27 December 1901. The Chief Justice of the Calcutta High Court accordingly determined that the appellant would reach the age of superannuation (retirement) on 26 December 1961 and asked him to demit his office on that date and allotted him no further work beyond it. The Supreme Court ultimately concluded that the determination as to the appellant's age should be made solely by the President of India and not the government.

**[37]** The respondents argued that *Jyoti* is not authority for the proposition which the appellants made, that is to say, that the de facto doctrine does not apply to constitutional appointments. It was submitted that the above passage on which the appellants relied on, is at best obiter dicta because the case itself did not concern the question as to the validity of the decisions made by the appellant post superannuation. With respect, we agree with the respondents. *Gokaraju*, when understood and read in light of its facts, posits the ratio decidendi that the de facto doctrine applies to constitutional appointments and the kind of appointment (whether of a superior court judge or subordinate court judge) does not matter. *Jyoti* does not in any way alter or affect that conclusion. The dictum of Gajendragadkar CJ when read in context does not therefore lend much assistance to the applicants.

**[38]** Learned counsel, Datuk Seri Gopal Sri Ram also made reference to the judgment of Ward CJ in *Re Nori's Application* [1989] LRC (Const) 10 ('Nori') for the proposition that common law cannot take precedence over the FC. Learned counsel read out on the following passage of Ward CJ's judgment, at p 22:

> A similar conclusion was reached by the New Zealand Court of Appeal in *Re Aldridge* (1893) 15 NZLR 361 after an exhaustive examination of the authorities (especially in the judgments of Prendergast CJ and Richmond J). Recent cases in England (*Adams v Adams* [1971] P 188 and *Re James (an insolvent) (A-G intervening)* [1977] 1 All ER 364) affirm these earlier decisions.

A Mr Nori does not accept those authorities as having any force here. The law we are considering, he points out, is a Solomon Islands law. Nothing in it suggests the doctrine of de facto office has any place here. By s 76 and Sch 3 to the Constitution, the principles and rules of the common law and equity shall have effect as part of the law of Solomon Islands save in so far as they are inconsistent with the Constitution B or any Act of Parliament. Therefore, he argues, as the Constitution requires the participation of the Governor General for the election of a Prime Minister and the appointment of the Ministers of the Government, it clearly requires a Governor General de jure. When Sir George performed those acts earlier this year, he was not an officer de jure and so the acts must be void. Any provision of the common law C that allows an interpretation inconsistent with that shall not have effect as part of the law of Solomon Islands.

**[39]** With respect, the above passage must be read in context. Ward CJ merely repeated and summarised the argument of the applicant in that case. D On the facts, Ward CJ nonetheless concluded that the de facto doctrine could apply to the Governor General of Solomon Islands to preserve all subsequent acts of his such as the dissolution of Parliament and the subsequent appointments of the Prime Minister and Cabinet as factually valid. While the appointment of the Governor General Sir George Lepping was held to be E invalid, his acts during the period of invalidity were deemed valid. To complete the narrative on this point, Ward CJ, in response to the arguments which he rejected, observed as follows, at pp 22–23:

I think he takes the provision too far. The application of the common law doctrine of de facto office to the situation we now face does not suggest the Governor General F can act outside the Constitution or ignore the requirements of the law. Everything he did after his appointment was done according to the requirements of the law and accepted to be so by the public as a whole. Neither does it suggest he be considered a de facto officer except when he is the apparent incumbent of a de jure office. What the application of this doctrine does is to consider the effect on those acts of a G misapprehension of his position ...

I feel, with respect, that is a sound argument. I cannot accept the subsequent discovery that an earlier and, to all appearances, lawful act was carried out by an officer who, through some inadvertence, was not lawfully appointed can invalidate that act. To do so would create an impossible situation. One only needs to ask how H far back this would apply to realise the impossibility of such a view.

**[40]** Accordingly, we are unpersuaded that *Nori* is authority for the proposition that the de facto doctrine cannot apply to constitutional appointments. The ratio of the case establishes quite the opposite. The I Governor General is the representative of the Sovereign, Her Majesty the Queen of England, and his appointment is thus a constitutional one. The case further fortifies our view that the de facto doctrine applies to preserve the appointment of Superior Court judges inasmuch as it applied to the constitutionally appointed District Court judges in *Gokaraju* or the Governor

General in *Nori*.

**[41]** Finally, learned counsel for the respondent in Tan Boon Lee's motion, Mr Su Tiang Joo, referred us to art 125(8) of the FC for the argument that the provision constitutionally encapsulates the de facto doctrine. It reads as follows:

> Notwithstanding Clause (1), the validity of anything done by a judge of the Federal Court shall not be questioned on the ground that he had attained the age at which he was required to retire.

**[42]** Clause (1) of art 125 of the FC in turn provides:

> Subject to the provisions of Clauses (2) to (5), a judge of the Federal Court shall hold office until he attains the age of sixty-six years or such later time, not being later than six months after he attains that age, as the Yang di- Pertuan Agong may approve.

**[43]** Learned counsel however, did not make any reference to any decided cases to support his submission. Regardless, the judgment of the Court of Appeal of Jamaica in *Chen-Young and others v Eagle Merchant Bank Jamaica Ltd and others* [2018] JMCA App 7 ('Chen-Young') suggests in its interpretation of s 106(3) of the Jamaican Constitution (in pari materia with our art 125(8) of the FC), that the provision only applies to cases concerning judges who deliver judgments notwithstanding their retirement.

**[44]** Without commenting on the correctness of that opinion, it is our view that it is not necessary for us to dwell on art 125(8) of the FC within the context of these review motions as what we are required to deal with is not a situation where retired judges delivered judgment pass their retirement date. Instead, it concerns the two judges, their appointments as additional judges of the Federal Court and them holding office as Chief Justice and President of the Court of Appeal, respectively. To that extent, we have already observed that upon the application of the foregoing authorities, irrespective of art 125(8) of the FC, the de facto doctrine applies.

**[45]** Accordingly, it is our considered view that the applicants are not entitled to collaterally challenge the validity of the appointments of the two judges through these review motions. In any case, even if they were successful in that challenge, the decisions of the two judges will continue to stand by virtue of the de facto doctrine. It therefore follows that the common point in all the review motions fails.

**[46]** We will now proceed to address the specific points raised in each set of motions.

*The Yakin Tenggara motions*

**[47]** The Yakin Tenggara motions concern the decision of the Federal Court dated 10 October 2018. The five-member panel which originally heard the case consisted of Zulkefli Ahmad Makinudin PCA, Ramly Ali FCJ, Azahar Mohamed FCJ, Balia Yusof Hj Wahi FCJ and Alizatul Khair Osman Khairuddin FCJ. However, by the time the case came up for decision, Zulkefli PCA had resigned. The decision of the Federal Court was split 3–1 with Ramly Ali FCJ delivering the decision of the majority and Balia FCJ for the minority. In delivering the minority judgment, Balia FCJ said this:

> The judgment as set out below was prepared by Tan Sri Zulkefli bin Ahmad Makinudin, the then President of the Court of Appeal, prior to his retirement. I concur with and adopt the judgment.

**[48]** The applicants' complaint is that Balia Yusof FCJ was not entitled to adopt the 'judgment' of Zulkefli PCA who at the time had already resigned (though the word Balia FCJ used was 'retirement'). Accordingly, the applicants placed significant reliance on the judgment of this court in *Bellajade Sdn Bhd v CME Group Bhd and another appeal* [2019] 5 MLJ 141 ('Bellajade') to argue that the decision of the Federal Court dated 10 October 2018 is bad and is liable to be set aside.

**[49]** At first blush, it would appear that *Bellajade* lends significant assistance to the applicants. However, upon careful perusal of the submissions, the authorities and upon further deliberation, we considered otherwise. The issue in *Bellajade* was very similar to the one giving rise to the present motions. There, the majority of the Federal Court purported to adopt the judgment of Zulkefli PCA, who had already resigned. A differently constituted panel of this court allowed the motion for review, set aside the judgment of the previous panel and ordered that the appeals be reheard.

**[50]** The respondents' submission, as we understand it, is that *Bellajade* is entirely distinguishable. That case concerned the invalidity of the majority judgment. Here, the respondents argued, the 'adoption' was of a minority judgment and that the majority judgment still stands as valid having been delivered by an uneven number of three judges. We find merit in this contention.

**[51]** The primary provision which governs the continuation of proceedings (including the delivery of judgment) notwithstanding the absence of a judge is s 78 of the Courts of Judicature Act 1964 ('the CJA 1964'). The only provision which concerns us is sub-s (2) which provides:

(2) In any such case as is mentioned in subsection (1) the proceedings shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceedings shall be re-heard.

**[52]** The question is how should we interpret the phrase 'the opinion of the majority of the remaining judges of the court'? It could have one of two meanings.

**[53]** The first possible meaning is that notwithstanding the absence of a judge, the judges who remain still comprise a valid coram. Though there may be a split decision, and there is an uneven number (not being less than two) to make up the coram, the dissenting judge is still counted in the coram. Suppose, in a coram of five, only four judges remain to deliver judgment. Neither the majority nor the minority are allowed to rely on the opinion of a judge who does not compose the court. Thus, the judgment delivered, though by majority, must only be from the 'remaining judges'. The emphasis is on the words 'remaining judges'. If we go by this argument, the applicants are right in their argument that there was coram failure.

**[54]** The second possible construction, wider than the first, is this. So long as there is a decision from an uneven number of judges (not being less than two) from among judges who composed the court and who have not retired, there is a valid majority decision. Accordingly, it matters not whether there was a dissenting judge or for that matter, whether his dissenting judgment was invalid or not.

**[55]** The fundamental difference between the two possibilities is that in the case of the first, while the majority decision may stand in terms of numbers, the whole decision is deemed invalid because the dissenting judge being counted towards the coram, relied on the 'judgment' of a person who was not a 'remaining judge' and thus from someone not 'composing the court'. In the second possible interpretation, the opinion of the dissenting judge is severable and the majority decision (having made up the numbers) still comprises the decision of 'remaining judges' and is thus valid.

**[56]** We prefer the second possible construction for the reason that it accords with the purposive rule of construction. Section 17A of Act 388 requires that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object. In this case, a provision which supports the intention of Parliament is to be preferred over the one which militates against it. It is a settled principle of law that the purposive rule applies where there is ambiguity in a statute such as when a literal reading of it opens it to two or more meanings. The interpretation which favours the

provision's intendment is to be preferred (see *Malayan Estates* at para 12). What then is this purpose we are referring to?

**[57]** It is trite law that dissenting judgments have no force of law. See for example a comment by the United States' Supreme Court in *United States R Retirement Bd v Fritz* (1980) 449 US 166 at footnote 10, per Rehnquist J:

> The comments in the dissenting opinion ... are just that: comments in a dissenting opinion ...

**[58]** Here the rule has statutory recognition by virtue of ss 74 and 77 of the CJA 1964. Section 74 requires that all proceedings of the Federal Court shall be disposed of by three judges or such greater uneven number of judges while s 77 stipulates that the said proceedings shall be determined in accordance with the majority opinion of the judges composing the court. It therefore stands to reason that legally speaking, minority judgments do not have any force of law as between the parties in that suit. Nevertheless, they play an important role in subsequent cases in the development of the law (see generally, Tan Sri Richard Malanjum, 'The 17th Ahmad Ibrahim Memorial Lecture — The Role of Dissenting Judgments' (19 October 2018); and *Additional District Magistrate, Jabalpur v SS Shukla etc* 1976 AIR 1207, per Khanna J at p 1277).

**[59]** Of course, we acknowledge that ss 74 and 77 of the CJA 1964 are only applicable to 'properly constituted courts' — in the sense of the phrase. Section 78 of the CJA 1964 encompasses situations where the original coram suffers infirmities which the section sets out. Section 78 was amended in 1998 vide Act A1031. The pre-amendment s 78(1) only allowed the continuation of proceedings upon consent of parties and if such consent was absent, then according to the now deleted s 78(3), the proceedings had to be reheard (see: *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673). The post-amendment s 78(1) and 78(3) of the CJA 1964 do away with the consent requirement while retaining s 78(2) in its original form.

**[60]** The logical conclusion from this is that Parliament had intended that the validity of the proceedings cannot be left to the choice of mutual consent by parties. In this sense, the legislative intent for amending s 78 of the CJA 1964 but retaining s 78(2) was to merely restate the rule in s 77, that is to say, so long as there is a decision from the 'majority of the judges composing the court', there is a valid and enforceable decision. The critical difference between ss 77 and 78 of the CJA 1964 is that the former employs the narrower phrase 'majority of the judges composing the court' while the latter section drops the words 'composing the court'. Thus, even if the minority opinion adopts the judgment of a person who no longer composes the court, the majority judgment remains valid if it is delivered by the majority of the remaining judges not being less than two.

**[61]** The above is in stark contrast to *Bellajade* where the 'majority judgment' was not the opinion of the remaining judges. It was that of a person who was a non-remaining judge. The 'majority judgment', in that case, did not therefore legally exist in accordance with s 78(2) of the CJA. This is apparent in the opinion of David Wong CJSS:

> [27] ... As Tan Sri Zulkefli at the date of pronouncement of the judgment on 25 September 2018 did not hold any judicial post, his judgment cannot be featured in any way at all as by doing so it can be said that he continued to be a member of the coram on that day hence it was not legally competent for the remaining Judges to deliver and pronounce his judgment. As stated earlier, the views of the three remaining judges must be theirs. Relying on the impugned judgment by concurring with and adopting it gave rise to the inference that the 'mind of the court' was that of a judge who had lost his jurisdiction due to his resignation.

**[62]** Here, for reasons stated, *Bellajade* applies only to the extent of invalidating the minority judgment. But, upon a purposive construction of s 78(2) of the CJA 1964, the majority judgment stands independently of the minority judgment and it having been delivered by the majority of the remaining judges of the court, is valid. For all intents and purposes, the judgment impugned in this case did represent the views of 'the three remaining judges' and hence it is valid.

**[63]** As such, we find no merit in the Yakin Tenggara motions and they are accordingly dismissed with costs.

*The Yong Tshu Khin motions*

**[64]** The Federal Court decision giving rise to the Yong Tshu Khin Motions was delivered on 9 July 2018. The panel consisted of Raus Sharif CJ, Hasan Lah FCJ, Azahar Mohamed FCJ, Balia Yusof Hj Wahi FCJ and Alizatul Khair Osman Khairuddin FCJ. The decision was read out by Azahar Mohamed sitting alone but the judgment was signed by Raus Sharif CJ.

**[65]** Two counsel argued the review motions namely, Dato' Loh Siew Cheang ('Dato' Loh') and Mr Ling Young Tuen ('Mr Ling'). The points they canvassed were different and we shall address them in turn beginning with the jurisdictional issue raised by Mr Ling.

**[66]** Mr Ling argued that the Federal Court panel which delivered the judgment was not of a duly constituted Court. His argument is that Azahar Mohamed FCJ was not entitled to deliver the judgment sitting alone as that violates s 78(1) of the CJA 1964 which, according to counsel, requires that where a judge is 'absent' the proceedings can continue provided that the number of judges in the coram is not less than two. Counsel submitted that

here we have a situation with a judge sitting in a coram with less than two. In support of his submission, Mr Ling made reference to the judgment of this Court in *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1 ('Chia Yan Tek').

**[67]** During argument we had posed a question to learned counsel on the application of r 63 of the RFC 1995. We queried him as to whether, if we go by his submission, he concedes that the prevailing practice of the Federal Court (and indeed of the Court of Appeal) of having registrars read out court judgments in the absence of a judge is an erroneous one. He conceded so.

**[68]** With respect, *Chia Yan Tek*, as will be seen, is the answer to the very issue he raised. Hence, upon a proper reading of the case, there is no merit in learned counsel's contention.

**[69]** Rule 63 of the RFC 1995 provides as follows:

> 63 Pronouncement of judgement
>
> (1) The judgment of the Court shall be pronounced in open Court, either on the hearing of the appeal or any subsequent time, of which notice shall be given by the Registrar to the parties to the appeal.
>
> (2) Such judgment may be pronounced notwithstanding the absence of the Judges who composed the Court or any of them, and the judgment of any Judge not present may be read by a Judge of the Court or by the Registrar.

**[70]** It is our considered view, upon considering all the relevant authorities, namely *Bellajade*, *Chia Yan Teck*, *Ramachandran a/l Suppiah v Public Prosecutor and another motion* [1992] 2 SLR 707; [1992] 2 SLR(R) 571 ('Ramachandran') and *Surendra Singh and others v The State of Uttar Pradesh* 1954 AIR 194 ('Surendra'), that the word 'absence' in r 63(2) does not share the same meaning as the word 'absence' in s 78(1) of the CJA 1964. The cases illustrate that there is a fundamental difference between the procedural and substantive validity of a judgment vis a vis the coram.

**[71]** As alluded to earlier in our discussion on the Yakin Tenggara motions, s 78(1) is the statutory exception to s 74. That is to say, section 78 is a deeming provision which saves the disruption of the panel which was originally properly constituted under s 74. The disruption may have been caused by any of the grounds stated in s 78(1). These grounds such as a judge being 'unable, through illness or any other cause' (appearing in the earlier part of the section) or 'the absence or inability to act' (appearing in the later part of the same section), all refer to legal incapacity. Examples include retirement, illness or resignation. These are legal grounds which either permanently or temporarily remove the given judge from existence in the panel. The post- amendment s 78(1) ensures

that proceedings can continue without having to dissolve the coram subject to the condition that the panel is not reduced to less than two judges.

**[72]** Section 78(1) of the CJA 1964 is broad. *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 at p 481, is the case to show how the Federal Court sat on thirteen occasions and that the proceedings continued with judgment reserved and delivered in spite of the untimely demise of Wan Adnan PCA. In *Chia Yan Tek*, two of the three judges composing the court hearing the appeal had retired. The review panel set aside the court's earlier decision because the retirement of the two judges, bringing the coram down to just one judge, could no longer be saved by s 78(1). In *Bellajade*, Zulkefli PCA had resigned and the majority purported to read out the judgment of a judge who was legally deemed to no longer exist as a judge. In all these cases, s 78(1) was attracted because the relevant judges were incapable of acting as a matter of law such that the substantive validity of the entire coram was affected.

**[73]** Rule 63 in turn refers to the manner in which a judgment is to be pronounced. It is a procedural provision applicable to both ss 74 and 78 of the CJA. A judgment shall be pronounced in open court even if a judge is absent so long as the coram is substantively constituted (s 74) or is deemed validly constituted (s 78). Thus, whether it is the full coram or a duly deemed constituted coram, r 63 is the procedure on how such judgment of the panel is to be delivered. 'Absence' in r 63 must therefore be construed to mean mere physical absence and as such, so long as the substantive coram of the court is validly and legally constituted, or deemed to be validly and legally constituted at the time the judgment is delivered, the judgment may be pronounced in the physical absence of that judge by another judge or a registrar. This conclusion is supported by the dictum of Yong Pung How CJ in *Ramachandran* referring to the judgment of Bose J in *Surendra*, as follows:

> [5] ... Therefore, any judge who delivers a judgment or causes it to be delivered by a brother judge must be in existence as a proper member of the court at the moment of delivery.

**[74]** Ultimately, in an appellate court setting, the judgment delivered by the judge which has been read and agreed upon by the other existing judges in the panel is the judgment of the court. It not solely his or her judgment alone once it is delivered or read out in open court. Thus, so long as the remaining members composing the court remain in legal existence, there is no impediment to the judgment being delivered under r 63 of the RFC 1995. In this regard, we are also persuaded by the judgment of this court in *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469 ('Syed Kechik') which arrived at a similar conclusion on its construction of the equipollent provision of r 63 of the RFC

in the Rules of the Court of Appeal 1994 and s 42 of the CJA (in pari materia with s 78).

**[75]** It therefore follows that we are not persuaded by Mr Ling's argument. Azahar Mohamed FCJ sitting alone to read out the judgment of Raus Sharif CJ is justified under r 63. The four other judges in the panel still legally existed when the decision was delivered. As such there is no legal incapacity affecting the coram to bring into effect s 78(1) of the CJA 1964. We therefore find no merit in Mr Ling's argument that there was coram failure by the delivery of the judgment by Azahar Mohamed FCJ sitting alone. This brings us to Dato' Loh's submission.

**[76]** Dato' Loh's argument is threefold. He argued that firstly, the Federal Court did not have jurisdiction under s 96(a) of the CJA 1964 to make the decision. Secondly, there was a breach of natural justice as the applicants were not heard on certain matters which learned counsel argued were not in issue in the courts below. And thirdly, the decision was erroneous.

**[77]** Before delving into these allegations, we think it is important to first restate the basic tenets of a r 137 of the RFC review motion. This is very adequately summed up in the words of Abdul Hamid Mohamad CJ in *Asean Security Paper Mills Sdn Bhd v Mitsui Sumimoto Insurance (Malaysia) Bhd* [2008] MLJU 1090; [2008] MLJU 251; [2008] 6 CLJ 1 ('Paper Mills'), as follows:

> [4] In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called 'revisiting'. Certainly, it should not be taken up in the same case by way of a review. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many times warned against such attempts.

**[78]** The review process is not intended to give the losing litigant a second bite at the proverbial cherry. Motions for review are not meant to operate as another tier of appeal. It is confined to the very specific purpose to prevent a manifest miscarriage of justice. While 'miscarriage of justice' is not an easy phrase to define, the development of our case law makes it abundantly clear that the correctness of a decision of the Federal Court is not, per se, a valid reason to seek a review of it. The public policy reason for setting this high threshold is premised on a simple fact that there must be finality to litigation, and if we may add: due respect to the decision of the final court of appeal.

**[79]** We accept Dato' Loh's general submission that a breach of natural justice is indeed a valid ground of review under r 137 of the RFC 1995. At least one case supports this assertion (see generally: *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351 ('See Teow Chuan')). And it is trite that natural justice means the right to be heard and the right to an unbiased decision-maker or tribunal.

**[80]** A case on point which deals specifically with the right to be heard in the context of a r 137 review motion is *Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd* [2010] 4 MLJ 483. In a short judgment, Zaki Azmi CJ noted that one of the main complaints by the applicant was that there was a breach of natural justice on account of the panel not having heard parties on the essential points of the decision. After having perused the authorities on the importance of finality to litigation, the learned Chief Justice remarked, as follows:

> [9] Having read their written submission, having heard the applicant and having perused through the reasons given by the Federal Court, I find no reason to allow this application. In my opinion, the two issues raised by the applicant in this case do not warrant this court to invoke r 137 of the Rules of the Federal Court 1995. The reasoning given by this court in the appeal proper is in my opinion a sound reasoning. No injustice or abuse of the process of the court has been occasioned.
>
> [10] I also find no necessity to delve into the issues in minute detail in this leave for review application.

**[81]** The ratio gleaned from the case is that a subsequent panel of the court need not have to examine its prior decision with a microscope to confirm that parties were accorded every opportunity to be heard on every microscopic point. Suffice to say that parties are allowed to canvass before the court each point striking to the substance of the case and that the court, in applying its own judicial mind and resources arrives at a decision on the law and on the facts of the case as submitted. It is one thing to say, on one side, that what was submitted was one thing but what was decided was something completely different and on the other, that while addressing the main issues (such as the leave questions), the court also found the need to address some other issues. Surely, the powers of the Federal Court as the apex court cannot be viewed so

narrowly as to exist in a vacuum or be altogether pigeonholed into specific boxes only to be examined later under a magnifying glass whether such decision strayed from the confines of the perimeters so artificially established.

**[82]** Indeed, that has never been the case with our law on the jurisdiction of the Federal Court. As the court observed in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97:

> [31] ... Although this court should give leave sparingly, once leave is granted, it is not bound hand and foot to limit itself to the framed issues. It may deal with any matter which it considers relevant for the purpose of doing complete justice according to the substantial merits of a particular case.

**[83]** The above case and our general discussion on the right to be heard is also our answer to Dato' Loh's submission on s 96(a) of the CJA 1964 in respect of how the Federal Court is said to have addressed issues which were not directly canvassed in the courts below.

**[84]** We have perused the judgment of the Federal Court dated 9 July 2018 and we find no reasons for review. Five very lengthy leave questions were framed and the court considered them and dealt with them accordingly. We are therefore not persuaded by the contentions of Dato' Loh. It is our view that the Yong Tshu Khin motions do not cross the threshold of review under r 137 of the RFC and they are accordingly dismissed with costs.

*Tan Boon Lee's motion*

**[85]** The Federal Court panel which heard the appeal comprised Raus Sharif CJ, Zulkefli Ahmad Makinudin PCA, Richard Malanjum CJSS, Aziah Ali FCJ and Prasad Sandosham Abraham FCJ. The High Court and the Court of Appeal concurrently held that the applicant is not a vexatious litigant. However, in a decision dated 26 September 2017, this court reversed the said concurrent findings and in doing so, declared the applicant a vexatious litigant.

**[86]** The applicant complained that a breach of natural justice has been occasioned on account that the Federal Court did not provide written grounds of judgment. Apart from citing *See Teow Chuan* for the general proposition that a breach of natural justice is a ground for review, the applicant has not referenced any other authority which suggests that the failure to provide grounds of judgment per se constitutes such a breach.

**[87]** Mr Ramkarpal's argument on the facts was that the Federal Court should have provided reasons for its decision to reverse the concurrent

decisions of the High Court and the Court of Appeal. Further, leave to appeal to the Federal Court was allowed indicating that the appeal was of public importance. Learned counsel submitted that surely, grounded on these facts, the court should have been minded to provide written reasons for its decision.

**[88]** In *English v Emery Reimbold & Strick Ltd* [2002] 3 All ER 385 ('English'), Lord Phillips MR remarked as follows:

> [15] There is a general recognition in the common law jurisdictions that it is desirable for judges to give reasons for their decisions, although it is not universally accepted that this is a mandatory requirement — 'There is no invariable rule established by New Zealand case law that Courts must give reasons for their decisions' (see *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at 565 (para 75) per Elias CJ).

**[89]** The above passage was cited with approval in at least two decisions of this court (see *Syed Kechik*, and in *Lim Lek Yan @ Lim Teck Yam v Yayasan Melaka and another application* [2010] 1 MLJ 173).

**[90]** Be that as it may, in *English*, Lord Phillips further remarked that the failure to give reasons might amount to a breach of natural justice. His Lordship observed as follows:

> [15] ... Reasons are required if decisions are to be acceptable to the parties and to members of the public ... the requirement to give reasons concentrates the mind of the judge and it has even been contended that the requirement to give reasons serves a vital function in constraining the judiciary's exercise of power ...
>
> [16] We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.

**[91]** Lest we be misunderstood, we are not setting a precedent that judges, at any level of the judicial hierarchy, are not required to provide written judgments for the decisions. Cases such as *English*, *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (cited in *English*) and *Flannery and another v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)* [2000] 1 WLR 377 (at p 382) suggest that the extent of the duty to give reasons depends on the subject-matter as well as the facts and circumstances of each and every case.

**[92]** In terms of subject-matter, it is settled judicial practice of this court that it does not typically give written reasons for the dismissal or the grant of leave applications (see generally the judgment of the Federal Court in *Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478).

**[93]** In terms of facts and circumstances and without being prescriptive, the obligation to give reasons may be particularly glaring when it concerns the

A appreciation and analysis of complex facts, where there is a right of appeal to a higher court or to a court with supervisory jurisdiction.

**[94]** In the present case, we appreciate that it is less than ideal that the applicant was not provided with written reasons for this court's reversal of the
B High Court and Court of Appeal's concurrent decisions. Having said that, we must remember that we are here dealing with an application for review. Is there a breach of a right so fundamental and prejudicial that it has occasioned a miscarriage of justice such that the decision delivered on 26 September 2017
C should be set aside altogether?

**[95]** Apart from the fact that the decisions of the lower courts were concurrent and that the Federal Court had reversed it, the applicant has not satisfied us that there has been a substantial miscarriage of justice within the
D meaning of r 137. Firstly, the Federal Court is the apex court and its decisions are not subject to appeal. There is therefore no other higher court capable to decide the correctness of the decision. And, as has been said before in our reference to *Paper Mills*, the review process is not by any means the forum for such a challenge.

E

**[96]** Secondly, we have considered the general submission of counsel for the applicant that the failure to provide reasons given the background of the applicant's case amounts to injustice and that the consequence of such an order declaring him to be a vexatious litigant denies him access to justice. Mr
F Ramkarpal had further submitted that given the infrequency of such orders, it would be useful to have general guidelines on the issue for the future. With respect, we are unable to accept how these arguments reflect a serious miscarriage of justice.

G **[97]** It is well within the power of the court to declare litigants as vexatious. The applicant was represented by counsel and he had the right to ventilate his arguments. This was done. Even if the court had provided reasons, it would not have changed the fact that the applicant would remain a vexatious litigant without any further right of appeal. And, the fact that the issue was of public
H importance does not automatically suggest that the failure to explain the decision amounts to a serious injustice to the applicant. Interests of justice also means justice for the respondent to know that there is finality to litigation.

**[98]** For the foregoing reasons, we find that no serious miscarriage of justice
I has been occasioned to the applicant such that the threshold of r 137 of the RFC 1995 has been met.

**[99]** Accordingly, we find that Tan Boon Lee's motion is without merit and is thus dismissed with costs.

*Tan Wei Hong's motion*

**[100]** In Tan Wei Hong's motion, the specific complaint against the decision of the Federal Court dated 28 November 2017 is that there was coram failure on account that the Federal Court did not consider at all the leave question posed in the case. The decision was a unanimous one delivered by a panel consisting of Raus Sharif CJ, Zulkefli Ahmad Makinudin PCA, Ramly Ali FCJ, Zaharah Ibrahim FCJ and Balia Yusof Haji Wahi FCJ. The grounds of judgment delivered post-decision was dated 22 May 2018.

**[101]** So that it is not said that we misunderstood the motion, we reproduce the relevant part as follows:

> 1. Bahawa perintah Mahkamah Persekutuan bertarikh 28hb November, 2017 dalam Rayuan Sivil No 02(f)-29–03/2017, Rayuan Sivil 01(f)-14-05/2017(W) dan Rayuan Sivil No 01(f)-15–05/2017(W) (selepas ini dirujuk sebagai 'rayuan-rayuan Mahkamah Persekutuan tersebut') yang menolak rayuan-rayuan kesemua pihak terhadap keputusan Mahkamah Rayuan masing-masing, disemak dan diketepikan oleh Mahkamah yang Mulia ini seakibat kegagalan koram Mahkamah Persekutuan ('coram failure') dan Rayuan-rayuan Mahkamah Persekutuan tersebut didengar semula oleh koram Mahkamah Persekutuan yang lain; dan
>
> 2. Apa jua perintah dan/atau relif lain yang difikirkan patut dan sesuai oleh Mahkamah yang Mulia ini.

**[102]** Those are the general prayers. One of the reasons given for coram failure is stated in para (c) of the grounds of the motion, as follows:

> Koram Mahkamah Persekutuan tersebut tidak langsung mempertimbangkan soalan yang dibenarkan berkenaan Rayuan Sivil No 02(f)-29-03/2017(W), sebelum menolak rayuan tersebut, sepertimana dapat dilihat daripada alasan penghakiman;

**[103]** With respect, we cannot see how such an allegation amounts to coram failure. Be that as it may, Ms Sitpah, counsel for the applicants argued that grave prejudice has been occasioned to the applicants by the failure of this court to answer the sole leave question posed in that case.

**[104]** It is a trite practice of this court that even where this court had granted leave, a subsequent panel of this court need not answer the leave question or questions posed if the circumstances do not require it. Support for this proposition is found in the judgment of this court in *UOL Credit Sdn Bhd v Dato' Vijay Kumar Natarajan* [2018] supp MLJ 439:

A [4] It is now settled that the grant of leave upon a question does not impose a duty on this court to answer it. Put differently, there is no legitimate expectation in an appellant by the mere grant of leave that the question posed will be answered. There are several cases that make this plain.

B **[105]** We acknowledge that the facts of that case were different from the present one. There, the appellant had filed a motion for leave to appeal to the Federal Court which this court granted. The respondent then filed a motion to set aside the grant of leave. The appeal and the respondent's motion eventually came up for hearing at which stage the respondent sought to amend its motion C to the effect that the court ought not to answer the leave question. The amendment was unopposed. This court then proceeded to hear the motion and upon the close of argument on the motion, the Federal Court dismissed the appeal. In a motion for review against that decision, this court held that there was no procedural unfairness and that it remains open to the opposing party to D object to the grant of leave even at the appeal stage.

**[106]** The wider ratio posited in the case is that just because leave is granted does not mean that the Federal Court is always obliged to answer it. This is E discernible from the court's approval of its earlier decision in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257. In that case, leave to appeal had been granted but the court, when disposing of the appeal, held that it was unnecessary to answer the leave question on account of the appeal itself being F fact sensitive.

**[107]** Other subsequent cases of this court have upheld this judicial practice whereby even if leave is granted, the court can, upon considering the merits of the appeal, decide that the appeal being fact sensitive, does not warrant its G answer to the leave question or questions (see *Clariant Masterbatches (M) Sdn Bhd v Prestige Dynamics Industries Sdn Bhd* [2019] 3 MLJ 701). It may also be the case that the court elects not to answer the question because upon considering the merits of the appeal, the facts of the case do not actually relate to the questions of law so specifically framed (see *Ng Chin Tai (trading in the* H *name and style of Lean Seh Fishery) & Anor v Ananda Kumar a/l Krishnan* [2020] 1 MLJ 16).

**[108]** Ms Sitpah took us through the grounds of judgment of this court and examined it as though the judgment was on appeal. As the cases cited have I shown, it was the prerogative of the court to decide, on the facts, whether the leave question warranted an answer. We have perused the judgment for ourselves. The Federal Court was essentially dealing with appeals against decisions of the High Court and the Court of Appeal in respect of a striking out application. Such an interlocutory appeal naturally concerns the issue of

discretion of the lower courts and necessarily involves issues of fact. It was the prerogative of the court not to answer or consider the leave question.

**[109]** As such, we fail to see how the applicants in Tan Wei Hong's motion have suffered prejudice in the way Ms Sitpah suggests much less that the decision was bad on account of coram failure. Accordingly, we find the motion to be bereft of any merit and it is dismissed with costs.

CONCLUSION

**[110]** To conclude, it is our view that the common point in all review motions alleging coram failure is without merit. The appointments of the two judges and their decisions are both saved by the de facto doctrine. Further, upon our interpretation of the CJA 1964 and our consideration of decided cases, it is our view that the specific points alleging coram failure, breach of natural justice, or general injustice in the respective sets of motions, are also without merit.

**[111]** It follows that all the seven review motions are unanimously dismissed with costs.

*All seven motions dismissed for review.*

Reported by Ashok Kumar